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No. 87-1869

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT OWNERS OF THE TRANS ALASKA PIPELINE SYSTEM

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QUESTIONS PRESENTED

1. Did the Federal Energy Regulatory Commission violate the Interstate Commerce Act, the due process clause of the Fifth Amendment, or its own regulations in approving a settlement of a rate investigation and terminating that investigation, while preserving the right of non-settling parties to initiate an action against the rates charged under the settlement?

2. Did the court of appeals violate this Court's rule in *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947) in upholding the Federal Energy Regulatory Commission's approval of that settlement?

RULE 28.1 DISCLOSURE

Pursuant to Supreme Court Rule 28.1, a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of respondents appears in the respondent's appendix at pp. 1a-2a.

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BRIEF IN OPPOSITION OF RESPONDENT OWNERS OF THE TRANS ALASKA PIPELINE SYSTEM

The owners of the Trans Alaska Pipeline System ("TAPS"),[1] respondents in the above captioned case, respectfully request that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which is reported at 832 F.2d 158 (Petitioner's Appendix at 1a-19a).[2]

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[1] The seven TAPS owners are: Amerada Hess Pipeline Corporation ("Amerada Hess"), ARCO Pipe Line Company ("ARCO"), Exxon Pipeline Company ("Exxon"), Mobil Alaska Pipeline Company ("Mobil"), Phillips Alaska Pipeline Corporation ("Phillips"), Sohio Alaska Pipe Line Company ("Sohio"), and Unocal Pipeline Company ("Union"). One of the original TAPS owners, BP Pipelines Inc. ("BP") was recently merged into Sohio, following the acquisition by The British Petroleum Company p.l.c. of Sohio's corporate parent.

[2] The relevant provisions of the Interstate Commerce Act (the "Act") and of the administrative regulations applicable to the

STATEMENT

TAPS is an 800-mile pipeline that transports crude oil from the Alaskan North Slope to the Port of Valdez on the Gulf of Alaska for transshipment by tanker to the lower 48 states. A unique set of circumstances, including the harsh climate, rugged terrain, the demands of environmental protection (including substantial above-ground construction), and the exigencies of the mid-1970s energy crisis, all contributed to the $9 billion price tag of this unprecedented project. In 1977, when each of the TAPS owners filed its initial rate for transportation of crude oil through the pipeline, the Interstate Commerce Commission ("ICC"), which then had jurisdiction, ordered those rates suspended and instituted an investigation. The scope of the ensuing investigation into the TAPS rates ultimately conducted by the Federal Energy Regulatory Commission ("FERC" or "Commission") was on a scale similar to that of the construction project. The administrative proceedings alone spanned almost a full decade, producing tens of thousands of pages of testimony, and occupying the time of scores of lawyers, experts, judges, and other government officials.

After nine years of intensive administrative litigation, the parties with a direct economic interest in the proceeding entered into a settlement establishing a means of determining ceiling rates over the anticipated life of the pipeline. That settlement agreement has already reduced the initial rates that had precipitated the *TAPS* investigation by almost 50 percent. The FERC's review of the settlement itself resulted in more than a year of hearings, comments, evidentiary submissions and briefing, before the Commission approved the agreement as to all of the settling parties. The one non-consenting party, Arctic Slope Regional Corporation ("ASRC" or "Petitioner"), has neither shipped oil nor paid any TAPS rate up to the present time, but has based its participa-

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Trans Alaska Pipeline System rate proceedings ("*TAPS*") are set firth at App., *infra*, at 3a-10a.

tion in the proceeding on its professed concern about future TAPS rates (*i.e.*, in the 1990s). The Commission, noting that its approval of the settlement as to the consenting parties had no precedential effect, expressly preserved the right of ASRC to initiate a challenge to any future TAPS rates, whether determined in accordance with the settlement or not. On that basis, the Commission terminated its investigation, and the court of appeals upheld the Commission's action as a sound exercise of administrative discretion.

1. *The* TAPS *Rate Case.*

The initial rates filed in May and June of 1977 by each of the TAPS owners—which ranged from $6.04 to $6.44 per barrel—were substantially higher than those prevailing today under the *TAPS* settlement. Although the TAPS owners contended that their initial rates were consistent with long-standing practice in the oil pipeline industry, the rates elicited protests from the Antitrust Division of the United States Department of Justice ("DOJ"), the State of Alaska ("State" or "Alaska"), the Bureau of Investigations and Enforcement of the ICC, and ASRC. These protestants sought to persuade the ICC to invoke its power under Section 15(7) of the Interstate Commerce Act: (1) to enter upon a hearing concerning the lawfulness of the initial TAPS rates; and (2) to suspend those rates for the maximum statutory period of seven months. *TAPS*, 355 I.C.C. 80 (1977). After hearing argument, the ICC, on its own initiative, suspended the initial TAPS rates on June 28, 1977 for the full seven month period, allowing the TAPS owners to file lower interim rates pending an investigation into the lawfulness of the rates contained in the suspended schedules. *Id.* at 81-82, 86.[3]

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[3] This Court upheld the ICC's order suspending the TAPS carriers' initial rates and setting interim rates in *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978).

Shortly after an ICC Administrative Law Judge ("Judge" or "ALJ") had bifurcated the *TAPS* investigation,[4] the ICC's jurisdiction over oil pipeline rates was transferred to the FERC.[5] On February 1, 1980, after several months of hearings, Judge Max L. Kane issued an Initial Decision in Phase I addressing a number of methodological issues and purporting to establish rates for the years 1978 and 1979, subject to such adjustments as might arise from Phase II. *TAPS*, 10 FERC (CCH) ¶ 63,026 (1980). Both the TAPS owners and the protestants filed extensive exceptions to the Initial Decision, but before the Commission could resolve these exceptions, the Phase I Decision was overtaken by other events. Specifically, the Commission initiated a rulemaking proceeding in another oil pipeline rate case, *Williams Pipe Line Company*, to devise a generic methodology for reviewing oil pipeline rates. After the exceptions to the Initial Decision in *TAPS* had been pending for more than two years, the Commission announced that a decision in *TAPS* would not be issued until it could reach a decision in *Williams*. *TAPS*, 20 FERC (CCH) ¶ 61,044 at 61,096 (1982).

On the strength of the *Williams* decision,[6] which established a new generic approach to oil pipeline ratemaking, the Commission remanded Phase I of *TAPS* to an ALJ to hold further hearings to determine whether its decision in *Williams* should affect its decision in *TAPS*. Again, however, events overtook the administrative process; before any such determination could be

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[4] Phase I of the *TAPS* proceeding was reserved for methodological ratemaking issues, while Phase II was devoted to cost of service issues such as the prudency of TAPS investment and expenses.

[5] Department of Energy Organization Act, 42 U.S.C. §§ 7101 *et seq.*, and Executive Order No. 12009 (October 1, 1977).

[6] *See Williams Pipe Line Co.*, Opinion No. 154, 21 FERC (CCH) ¶ 61,260 (Nov. 30, 1982), *rev'd sub nom. Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir.) (*"Farmers Union II"*), *cert. denied*, 469 U.S. 1034 (1984).

made, the court of appeals had overturned the innovative *Williams* decision (Opinion No. 154) in *Farmers Union II*, and the *TAPS* remand proceeding was suspended.[7]

Thus, by late fall of 1984, *TAPS* was nowhere near a final decision.

2. *The Background of the* TAPS *Settlement.*

Settlement discussions among the parties were prompted in no small part by their frustration over the obvious difficulty of resolving the myriad issues raised in this uniquely complex and seemingly interminable proceeding. The State, which was interested in securing just and reasonable rates for the life of the pipeline, realistically feared that the ongoing proceedings woulo permit only a decision as to the historic or "locked-in" rates being investigated, thus leaving future TAPS rates as a subject for future proceedings. At the same time, the carriers were faced with tremendous uncertainty as to future rates as well as potential refund obligations. These circumstances encouraged serious settlement discussions in which Alaska and ARCO took the lead. In November 1984, the State reached an agreement-in-principle with ARCO (subsequently joined by BP), which was to become the basis for settlement with the remaining TAPS carriers. By the middle of 1985, after securing only slight modifications in its terms, Exxon, Mobil, Phillips, and Union had joined the agreement.

In addition to establishing refunds for past periods—to be paid to the shippers who had utilized the pipeline and

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[7] In subsequent proceedings in *Williams*, *see* Opinion Nos. 154-B and 154-C, 31 FERC (CCH) ¶ 61,377, 33 FERC (CCH) ¶ 61,327 (1985), the Commission modified Opinion No. 154 to endorse a so-called Trended Original Cost model for setting just and reasonable oil pipeline rates, which differs markedly from the *TAPS* Initial Decision methodology. No hearings were held in *TAPS* to determine the applicability (if any) of the general rules established in Opinions Nos. 154-B and 154-C to the resolution of the issues in *TAPS*.

paid the challenged rates (a portion of these refunds inuring to the benefit of the State through its royalty and severance tax interest)—the *TAPS* settlement included a formula (the TAPS Settlement Methodology or "TSM") for calculating the maximum rates the carriers could charge until the year 2011, the end of the pipeline's estimated life. Over time, TSM is designed to achieve a sharply declining tariff profile through the use of accelerated depreciation, thus significantly reducing tariffs in future years when decisions regarding development of marginal petroleum reserves on Alaska's North Slope are likely to be made.[8] Under the settlement, the State agreed not to challenge TAPS rates so long as the carriers do not file rates which exceed the TSM ceiling. Furthermore, because the settlement agreement does not (and could not) impose any restrictions on the FERC's rate authority, TAPS rates are subject to formal complaint by any non-signatories (such as ASRC), whether or not such rates satisfy the terms of the settlement agreement. Similarly, because TSM requires the carriers to file revised tariffs with the Commission each year, the carriers are subject to the possibility of suspension and investigation of each such annual filing, either in response to protest by non-signatories or on the Commission's own motion.[9]

The Commission took the first step toward its ultimate approval of the agreement on October 23, 1985, when it

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[8] Since it has been in effect, TSM has already markedly reduced the pre-settlement TAPS rates from a weighted average of approximately $6.00 per barrel to $5.31 (immediately after adoption of the settlement) and, subsequently, to $4.49 in 1986, $3.91 in 1987 and $3.14 in 1988.

[9] To date, ASRC has not filed a formal complaint or a protest against the several rounds of TAPS rates which have been established pursuant to the settlement. Indeed, ASRC did not even attempt to intervene in a protest filed by the State on December 18, 1987, which alleged that the carriers had contravened TSM in certain respects. That protest was ultimately withdrawn on December 28, 1987, after the State and the carriers resolved their differences.

approved the *TAPS* settlement as "fair and reasonable and in the public interest" as among the State and the six settling carriers (all except Sohio and Amerada Hess).[10] *See TAPS*, 33 FERC (CCH) ¶ 61,064 (1985) ("October 23 Order") (Pet. App. at pp. 54a-64a). Recognizing the unique nature of the *TAPS* investigation, the Commission found that the "innovative methodology" fashioned by the settling parties would achieve their respective aims and result in a "rational and predictable tariff profile . . . [which would] encourage competitive exploration for Alaskan oil and enhance Alaska's future oil-related revenues." [11] While concluding that "the settling parties are entitled to the benefits of their bargain," the Commission "acknowledge[d] the concerns of the nonsettling parties and . . . remand[ed] the proceedings with regard to them to the administrative law judges to allow the nonsettling parties a hearing only on those issues which apply to them." *Id.* at 61,139-61,140.[12] On December 19, 1985, the Commission denied ASRC's request for rehearing of this order. *See TAPS*, 33 FERC (CCH) ¶ 61,392 (December 19, 1985) (Pet. App. at pp. 50a-53a).

The second step toward approval of the ultimate *TAPS* settlement occurred on June 27, 1986, when the FERC approved as uncontested an amendment to the *TAPS* settlement by which Sohio and Amerada Hess joined the accord, and, at the same time, severed ASRC (the sole re-

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[10] The ALJs had certified the Six-Carrier Settlement Agreement to the Commission on August 9, 1985, 32 FERC (CCH) ¶ 63,058.

[11] The Commission also approved under 49 U.S.C. § 5(1) a separate agreement implementing a specific provision in the settlement agreement, which, under certain conditions, permitted the reallocation of certain costs and revenues among the carriers.

[12] On remand, ASRC introduced evidence relating primarily to the alleged impact that imposing the settlement on ASRC would have on its potential lease and royalty interests. Because none of the parties advocated imposing the settlement on ASRC, this evidence was admitted into the record without cross-examination or rebuttal.

maining non-consenting party) from the proceeding. *TAPS*, 35 FERC ¶ 61,425 (June 27, 1986) (Pet. App. at pp. 22a-44a).[13] The Commission found that this "Two-Carrier Amendment" was "fair and reasonable and in the public interest" in accordance with FERC Rule 602(g), 18 C.F.R. § 385.602(g), governing approval of uncontested settlements. *Id.* at 61,977. In holding that severance of ASRC from the *TAPS* settlement rendered the agreement uncontested, the Commission reasoned that under its rules, "If a party's interests are not *immediately and irreparably affected* by approval of a settlement . . . , that party's opposition to a settlement does not create a genuine, material issue." *Id.* at 61,980-61,981 (emphasis in original) (citation omitted).

The Commission found that ASRC's interest in future TAPS rates was not "immediately and irreparably affected" for three reasons.[14] First, because the settlement was not imposed on ASRC, it retained the right to challenge any future TAPS rates by filing a protest under Section 15(7) or a formal complaint under Section 13(1) of the Act. *Id.* at 61,980. Second, because the Commission did not determine TSM rates to be just and reasonable, its approval of the settlement could not be used as precedent in a future proceeding involving those rates. *Id.* Third, the Commission pledged to permit ASRC to use in such a future proceeding, any relevant evidence from the *TAPS* record, and agreed to make available the same ALJs who had presided in the earlier *TAPS* pro-

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[13] The Judges had certified the "Two-Carrier Amendment" to the Commission on April 23, 1986, noting that it was "identical in all material respects to the June 28, 1985 settlement proposal . . . approved by the Commission on October 23, 1985." 35 FERC (CCH) ¶ 63,027 at 65,075. They concluded, however, that "the Commission does not have the authority, under the facts of the remanded proceeding, to impose the settlement on the objecting parties." *Id.* at 65,076.

[14] ASRC conceded before the FERC that it has no interest in refunds, because it has never shipped oil through TAPS or otherwise paid any tariff charges to the TAPS owners that could be refunded.

ceedings. *Id.* In terminating its investigation into the pre-settlement TAPS rates, the Commission rejected ASRC's contention that it was duty bound either by the Act or its own regulations to render a determination on the merits respecting TAPS rates or the settlement itself. *Id.*

3. *The Court of Appeals Decision.*

On October 27, 1987, the court of appeals denied ASRC's petitions for review, holding that the Commission's orders were within lawful bounds. 832 F.2d 158. Judge Kenneth Starr, writing for the unanimous panel, emphasized that ASRC's asserted interest in TAPS rates

> "stems from its ongoing negotiation of exploration leases and the level of bonus and royalty payments it may achieve, sources of compensation that are *potentially* affected by transportation costs in bringing oil via TAPS to market. [ASRC] has never shipped any oil through the pipeline; indeed, all agree that [ASRC] has no realistic possibility of doing so until sometime in the 1990's."

Id. at 160 (emphasis added). With due regard for that asserted interest, the court rejected the "thrust" of ASRC's challenge—namely, that the Commission was "duty bound under the Interstate Commerce Act to see the 1977 rate proceeding to the terminus of determining whether the challenged rates were 'just and reasonable' " —holding that the Interstate Commerce Act confers broad discretion on the Commission to dispose of investigations initiated under Section 15(7) of the Act. *Id.* at 163-164. The court also emphasized the broad discretion conferred upon the Commission under its settlement rules, which permit it to "sever" contesting parties from settlements and approve such settlements as uncontested among the consenting parties. *Id.* Because the case involved a settlement, and in view of the protracted proceedings which would still be required to reach a final decision on the merits, the court turned aside ASRC's contention

that the progress made toward a final decision mandated a fully litigated outcome.

Although the court disputed the Commission's contention that ASRC was not aggrieved by the Commission's action and ruled that ASRC had standing to appeal the Commission's decisions, *id.* at 163-164, n.10, the court agreed that the Commission had adequately "safeguarded" ASRC's interest in TAPS rates. *Id.* at 167. Noting that ASRC was not a current ratepayer for transportation through TAPS, and that its right to challenge future TAPS rates was fully protected, the court concluded that the Commission had "serve[d] [ASRC's] interests by not forcing the settlement upon [ASRC] and by preserving possible future challenges for a riper moment." *Id.* That fact, coupled with the important public interest advantages of the settlement, persuaded the court that "the Commission acted within its lawful authority and sound discretion in closing a long and wearisome chapter in the saga of TAPS rate regulation." *Id.* at 168.

On January 15, 1988, the original panel of the court of appeals denied ASRC's petition for rehearing, and the court unanimously rejected ASRC's suggestion for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

The settlement Petitioner would have this Court disturb is the carefully-crafted product of years of arduous negotiation among the settling parties and additional years of detailed scrutiny by the FERC and the court of appeals. The public interest benefits achieved by this settlement are already a matter of public record. Namely, the most extensive oil pipeline rate case ever litigated has been ended with an agreement that resulted in the payment of refunds for the historic rates that precipitated the proceeding, and established a predictable methodology (TSM) for determining *a ceiling* on future TAPS rates. The Commission, the presiding ALJs, and the settling parties themselves concluded that TSM would

substantially enhance development of Alaskan North Slope oil reserves through a rapidly declining rate profile; in fact, TSM has ushered in an almost 50 percent rate reduction over the past three years. Because it is not bound by the settlement, Petitioner retains the right to seek even further rate reductions by initiating a new challenge against the prevailing rates, whether or not established pursuant to TSM.

Against the tide of unanimous assent by the two administrative law judges who presided over this litigation at the FERC; the five FERC commissioners who voted to approve the settlement; the three court of appeals judges who upheld the FERC's orders on the merits; and the ten other judges who voted unanimously to deny rehearing *en banc*, Petitioner raises two principal criticisms, neither of which withstands even passing scrutiny. First, Petitioner contends that the Interstate Commerce Act, the Commission's regulations, and due process all mandate a final litigated conclusion of the FERC's investigation in *TAPS*, notwithstanding that the settlement effectively superseded the initial rates upon which the investigation was founded and the record compiled. In making this argument, however, Petitioner relies on an inapplicable statutory provision; obscures the plain language of the Commission's settlement rules; and brushes to one side both the extensive opportunities it was given to express its position and the Commission's virtual invitation to ASRC to exhaust its administrative remedies by initiating a new proceeding against the prevailing TAPS rates. Moreover, in invoking the Court's *certiorari* jurisdiction, Petitioner has failed to demonstrate that this narrow and fact-bound issue warrants plenary review by the Court.

Second, Petitioner asserts, purely on semantic grounds, that the court of appeals improperly deviated from the rationale adopted by the Commission in approving the settlement. Here, Petitioner's argument seizes on a subtle disagreement involving subsidiary issues of standing,

while disregarding the substance of the court's clear endorsement of the FERC's efforts to safeguard Petitioner's asserted interests by preserving its right to seek further administrative redress. Petitioner's hypertechnical and baseless ground for challenging the court of appeals' decision—which involves neither an unsettled issue of law nor a conflict in the lower courts—thus falls of its own weight.

I. PETITIONER HAS PRESENTED NO LEGAL ISSUE WARRANTING THIS COURT'S ATTENTION.

Petitioner has been utterly unable to establish that the decision below raises any significant legal issue or presents any substantive conflict with decisions of this Court or any court of appeals. Nor has Petitioner identified any cognizable interest to be advanced by this Court's review. Clearly, ASRC will suffer no irreparable injury, now or in the future if the decision below is sustained, since it retains all of the legal remedies it had before the settlement was approved. Simply stated, no valid ground exists in this case for invoking the certiorari jurisdiction of this Court.

A. The Commission's Action In Approving The *TAPS* Settlement And Terminating Its Investigation Did Not Violate The Interstate Commerce Act.

Petitioner's contention that the Interstate Commerce Act required the Commission to resolve its investigation in *TAPS* on the merits stems from a fundamental misconception of the nature of that proceeding and the governing statutory scheme. Petitioner does not, and could not, dispute that the Commission was authorized to terminate an investigation initiated under Section 15(7) of the Act, 49 U.S.C. § 15(7). Rather, Petitioner asserts erroneously that the Commission's investigation was initiated by a formal complaint under Section 13(1) of the Act, 49 U.S.C. § 13(1).

However, as the court of appeals recognized, the *TAPS* proceeding was *not* prompted by a formal complaint under

that section; rather, the Commission's investigation was initiated, *sua sponte*, following protests requesting that the Commission exercise its discretionary powers to suspend and investigate the intial rates proposed by the TAPS carriers under Sections 15(1) and 15(7) of the Act.[15] Thus, in initiating its investigation, the ICC referred specifically and solely to "protests and petitions" asking it to "invoke [its] power under section 15(7) of the Interstate Commerce Act," 355 I.C.C. 80.[16] Whatever ASRC may say now, it has never even attempted to invoke the Commission's authority under Section 13 by filing a formal complaint under that section.

Petitioner responds lamely that "because there is no requirement that the complainant or the Commission expressly cite Section 13 in order to invoke that provision, the court of appeals erred in relying on the absence of any such explicit reference in concluding that Section 13 was not involved in this case." Pet. at 23 (citations omitted). To the contrary, the procedural rule in effect when ASRC filed its protest in June of 1977, and expressly invoked by ASRC, specifically *forbade* the filing of formal complaints under Section 13 by a protestant petitioning the Commission to initiate a suspension and investigation proceeding under Section 15(7):

> "*Such protests will be considered as addressed to the discretion of the Commission and no protest shall include a prayer that it also be considered a formal complaint.* Should a protestant desire to proceed

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[15] Just as Section 15(7) provides that the Commission may institute an investigation "upon complaint *or* upon its own initiative without complaint," Section 15(1) empowers the Commission to prescribe just and reasonable rates "after full hearing, upon a complaint made as provided in section 13 . . . *or* after full hearing . . . by the Commission on its own initiative. . . ." 49 U.S.C. § 15(1) (emphasis added).

[16] *See also Trans Alaska Pipeline Rate Cases, supra*, 436 U.S. at 635 ("Acting pursuant to § 15(7) of the . . . Act, the [ICC] found that the *protests* lodged against the TAPS tariffs gave it [the ICC] 'reason to believe the proposed [initial] rates are not just and reasonable.' ") (emphasis added).

> further against a tariff or schedule which is not suspended, or which has been suspended and the suspension vacated, *a separate later formal complaint or petition should be filed.*"

49 C.F.R. § 1100.42(a) (1976) ("Rule 42") (emphasis added), *cited in Trans Alaska Pipeline Rate Cases, supra,* 436 U.S. at 635 n.5.[17]

Petitioner's alternative suggestion—that a protest "addressed to the Commission's discretion" under Section 15(7) must also be regarded as a formal complaint under Section 13—is equally absurd. This Court has made clear in the past that Sections 13 and 15 provide two entirely distinct remedies. Thus, in *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 at 463 (1979) ("*Southern*"), the Court stated:

> "It is . . . clear that [the § 13(1)] remedy is independent of § 15(8)(a) proceedings. First, the language of § 15(8)(a) suggests no linkage to § 13(1) . . . . Second, § 13(1) has been an independent and self-contained procedure since the Act was first passed in 1887. When § 15(8)(a) was added some 23 years later, there was no indication that it was intended as an *amendment* to § 13(1), rather than as *a limited pre-effective and Commission-initiated alternative to the posteffective and shipper-initiated procedures in § 13(1).*"[18]

(Former emphasis in original, latter emphasis added).

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[17] On its face, Rule 42 refutes ASRC's assertion that its protest constituted a formal complaint *as of the date it was filed.* ASRC cannot assert that any subsequent event transformed the *TAPS* investigation into a complaint proceeding under Section 13. After the *TAPS* proceeding was transferred to the FERC, no protestant ever invoked Section 13; the FERC simply resumed the Section 15 investigation where the ICC had left off.

[18] Acceptance of Petitioner's assertion that a protest seeking suspension and investigation under Section 15(7) must also be regarded as a complaint under Section 13 would require this Court not only to repudiate the clear distinction between Section 13 and Section 15(7) which it has expressly recognized, but also to overturn a long line of cases upholding the Commission's discretion to

The court of appeals was thus clearly correct in acknowledging the Commission's broad discretion in conducting investigations initiated under Sections 15(7) and 15(1). The Commission's approval of the *TAPS* settlement without first determining that the rates established thereunder would be just and reasonable was tantamount to a decision not to investigate the underlying methodology of the settlement and the resultant rates. As this Court has held consistently, decisions of this nature are left exclusively to the Commission's discretion and may not be second-guessed by the courts. *See Southern, supra*, 442 U.S. at 452-454 (upholding ICC decision not to investigate the lawfulness of increased rates). Having approved the *TAPS* settlement without a decision on the merits, the Commission was under no compulsion to pursue its investigation into the no longer applicable "locked-in" TAPS rates.[19] *See National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 462 n.9, *reh'g denied*, 415 U.S. 952 (1974); *accord*

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forbear from exercising its authority under Section 15(7). *E.g., Southern, supra*; *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289 (1975); *United States v. SCRAP*, 412 U.S. 669 (1973); and *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658 (1963). In each of these cases, the Commission's decision not to act came in response to protests under Section 15(7) that were procedurally identical to the protest filed by ASRC in *TAPS*.

[19] Petitioner relies heavily on this Court's decision in *City of Chicago v. United States*, 396 U.S. 162 (1969), in asserting that the Commission was precluded from terminating its investigation without a decision on the merits. However, in *City of Chicago*, the ICC's decision terminating its investigation resulted in the immediate grant of the relief requested—*i.e.*, the discontinuance of passenger service. Here, the initial rates that precipitated the *TAPS* investigation were superseded by the *TAPS* settlement. Therefore, the only question to be resolved following approval of the *TAPS* settlement would have been whether the refunds paid under the settlement correctly reflected just and reasonable rates for the historic period. However, ASRC admittedly has no interest in or right to refunds, and no parties affected by this aspect of the settlement contested the amount of refunds agreed upon.

New York Dock Railway v. United States, 696 F.2d 32 (2d Cir. 1982). Finally, the Commission was not required under Section 15(1) to prescribe just and reasonable rates to be observed in the 1990s, when ASRC's shipments of oil may or may not materialize. *See United States v. Louisiana*, 290 U.S. 70 (1933).[20]

Nevertheless, Petitioner asserts that "[h]aving come this close to resolving the ratesetting methodology for the life of TAPS," the FERC was precluded from "concluding the proceeding without a decision." Pet. at 24 (citing *Minneapolis Gas Co. v. FPC*, 294 F.2d 212, 215 (D.C. Cir. 1961)). Petitioner's premise is without merit. As the court of appeals observed correctly, rather than being close to resolution, "the [*TAPS*] case was regrettably far from complete." 832 F.2d at 166.[21] The factual record in the *TAPS* proceedings ends in 1982, and it is absurd to contend that the truncated record could be used to determine rates appropriate for the mid-1990s. Petitioner's further insistence that the 1980 Phase I Decision would, but for the settlement, constitute the appropriate basis for determining TAPS rates today (much less for the mid-1990s), is equally off the mark; that decision not only fails to reflect any resolution of the exceptions filed by all the parties (including ASRC),

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[20] In practice, of course, a prescription of future rates does not establish permanent rates; such rates can be changed at any time if the Commission approves. Given the permissive nature of the authority conferred by Section 15(1) of the Act and the absence of any "meaningful standards" for exercising the Commission's authority, the court of appeals could not second-guess the Commission's decision not to prescribe future TAPS rates. *Heckler v. Chaney*, 470 U.S. 821, 832-833 (1985) (agency decisions not to enforce a statute are "presumptively unreviewable," and "the presumption [of unreviewability] may be rebutted [only] where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers").

[21] Indeed, at the time the settlement was before them, one of the ALJs who presided over the proceeding predicted that a final determination regarding TAPS rates would require "at least 10 years" of further litigation. (FERC Tr. 59,602.)

but also was reached without benefit of the substantial body of evidence submitted in the Phase I remand proceedings in 1982. Furthermore, since that preliminary decision was rendered, the Commission, responding to the dictates of the court of appeals, has significantly altered its general approach to regulating oil pipeline rates, thus rendering the Initial Decision's methodology presumptively inapposite to any resolution of the TAPS proceeding.[22]

B. The Commission Did Not Deprive ASRC Of Due Process In Approving The *TAPS* Settlement And Declining To Resolve ASRC's Objections On The Merits.

ASRC asserts that the Commission's handling of its investigation in *TAPS* violated the due process clause of the Fifth Amendment. However, a prerequisite for due process protection is some interest worthy of protection. Such protectable interests flow from "existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, at 481 (1972). In the present case, ASRC has failed to demonstrate either a genuine property interest *or* that the remedies that have been afforded it by the FERC fall short of constitutional requirements.

Petitioner's due process claim rests on nothing more than the untenable assumption that because its asserted interests were deemed by the court of appeals to support judicial standing, those interests must necessarily suffice as a property entitlement under the Fifth Amendment due process clause. However, as this Court has stated frequently, "a mere unilateral expectation or an

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[22] *See* Opinion Nos. 154-B and 154-C, *supra*, 31 FERC (CCH) ¶ 61,377, 33 FERC (CCH) ¶ 61,327 (1985).

abstract need is not a property interest entitled to protection." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *Roth, supra*, 408 U.S. at 577; *Perry v. Sindermann*, 408 U.S. 593, 603 (1972). Petitioner's alleged property interest in this case is extraordinarily speculative, rooted solely in ASRC's subjective expectation regarding the present value of its potential reserves and the possibility of such reserves successfully being developed.[23]

Moreover, even if Petitioner could demonstrate a genuine property interest stemming from its possible petroleum reserves, the Interstate Commerce Act confers no entitlement to immediate relief from the future TAPS rates that allegedly would impair that interest.[24] This

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[23] Notably, Petitioner has not yet extracted any oil from its lands, but has merely demonstrated varying degrees of likelihood that it *might* extract commercial quantities of petroleum in the mid-1990's. Nor has Petitioner established that any lease or royalty agreements into which it has actually entered have been affected by TAPS rates; it claims only that future TAPS rates may affect the returns it may receive under lease or royalty arrangements it may negotiate. Neither of these claimed interests possesses the level of certitude required to establish a genuine property interest.

[24] Petitioner has failed even to establish a direct link between TAPS rates and the results of its negotiations over lease and royalty agreements. As the court of appeals acknowledged, 832 F.2d at 160, ASRC's compensation under any impending lease and royalty agreements is only "*potentially* affected by transportation costs in bringing oil via TAPS to market." (Emphasis added).

The court noted that ASRC's petroleum prospects may hinge to a far greater degree upon world oil prices. *Id.* at 63 n.10. The tenuous nature of ASRC's exploratory prospects has been acknowledged by ASRC itself. In its comments on the Two-Carrier Amendment to the settlement agreement, ASRC asserted that its oil was considered "economically marginal" as of December 1985, and would be rendered unrecoverable by a tariff differential of less than $1.00 per barrel (C.A. App. 1389). Since the time of these comments, world oil prices have declined—to ASRC's disadvantage—more than $15.80 per barrel from approximately $28.60 in December of 1985, to approximately $12.80 as of July, 1988. *Platts Oilgram Price Report* (December 2, 1985 and July 11, 1988). During this same

Court has stated unequivocally that property entitlements are bestowed only by an express, unconditional statutory grant of such rights. *See Roth, supra*; *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). Where a statute confers discretion upon the administrator of a statute, and provides no clear guidelines governing the statute's enforcement, no genuine property right flows therefrom. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981). The statutory provisions applicable in the present case, Sections 15(7) and 15(1) of the Act, are completely discretionary and contain no guidelines to direct the Commission in its decisions to conduct investigations or prescribe just and reasonable rates for the future. *See, e.g., Southern, supra*, 442 U.S. 444. Particularly where, as here, Petitioner seeks relief from TSM rate ceilings in the 1990s that *may never be reached*,[25] its claimed entitlement for relief *today* is scarcely plausible.

In any case, the Commission clearly afforded ASRC all the process that was due under the circumstances. Although the required procedures may vary according to the interest at stake in a particular context, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319 (1976). In the present case, ASRC has been afforded every opportunity during the nine years of administrative proceedings before the FERC to state its position with respect to TAPS rates. Moreover, with respect to the settlement itself, ASRC was given repeated opportunities to demonstrate an impact from the

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period, TAPS rates declined—to ASRC's ultimate advantage—by almost $3.00, a decrease of almost 50%.

[25] As the Commission recognized in its June 27 Order, although the *TAPS* settlement provides that the State will not challenge rates at or below the TSM ceiling, it is not assured that rates will reach this maximum level in the 1990s, due to any number of economic uncertainties. 35 FERC (CCH) at 61,981.

settlement sufficient to justify rejection of the accord and require a Commission decision on the merits of TAPS rates. Indeed, the Commission went so far as to afford ASRC a proceeding of its own to demonstrate the need for immediate consideration of ASRC's complaints with regard to TAPS rates. By the time the FERC issued its June 27 Decision approving the settlement and terminating its investigation, the settlement itself had been the subject of more than a year of comments, evidence, hearings, briefs and procedural pleadings.

Even after the intensive proceedings devoted to the settlement, the Commission adequately "safeguarded" ASRC's potential interest "by not forcing the settlement upon [ASRC] and by preserving possible future challenges for a riper moment." 832 F.2d at 167. Thus, in its decision, the Commission repeatedly emphasized that "[w]e are not imposing the settlement on [ASRC] either directly or indirectly." 35 FERC (CCH) at 61,977. The Commission explained that, because ASRC was not bound by the settlement, it would be free to file a formal complaint against the settlement rates pursuant to Section 13(1) of the Act. *Id.* at 61,982. Further, because TSM requires that adjusted TAPS tariffs be filed every year, ASRC may file a protest under Section 15(7) at such times and request that the Commission suspend the filed rates and/or initiate an investigation. *Id.* at 61,983 n.17. The Commission declared, moreover, that all evidence introduced in the *TAPS* proceeding (as well as the same presiding ALJs) would be made available to ASRC in any subsequent proceeding.[26]

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[26] In a future proceeding under Section 15(7), the TAPS carriers would be required to demonstrate the reasonableness of TAPS rates, notwithstanding the FERC's approval of the settlement. As the Commission explained in its June 27 Decision, consistent with FERC rules, approval of the *TAPS* settlement has no precedential value with respect to future TAPS rates. *TAPS*, 35 FERC (CCH) at 61,981; *see also* 18 C.F.R. § 385.602(c)(1)(iv). The *TAPS* settlement agreement itself states that the parties do not intend that such approval will "have any precedential effect on tariff rate-

Petitioner can hardly contend that *only* the wholesale resurrection of the eleven-year-old *TAPS* investigation would accord it an "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews, supra.* To the contrary, in circumstances virtually identical to those presented here, this Court has consistently recognized that further administrative remedies suffice to redress any claimed injury suffered as a result of agency action or inaction.[27] Thus, in *Southern, supra,* 442 U.S. at 454, the Court upheld the Commission's decision not to investigate increased freight rates on the ground that "any shipper may require the Commission to investigate the lawfulness of any rate at any time—and may secure judicial review of any decision not to do so—by filing a § 13(1) complaint."[28] *See also U.S. v. SCRAP, supra,* 412 U.S. at 692 n.16. ASRC's apparent unwillingness to avail itself of this remedy adds no weight to its desire to choose the docket in which to pursue its asserted interests. That unwillingness does not represent a legally cognizable interest, and appears to stem only from ASRC's desire—for whatever reason—to undo the settlement and reopen a myriad of issues regarding historic TAPS rates in which ASRC has no interest whatever.

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making." Settleemnt Agreement, Introductory Statement at 2 (lodged as Supplemental Appendix).

[27] The notion that future administrative remedies suffice to accommodate injuries suffered in the course of an administrative proceeding has gained widespread acceptance among the courts in the specific area of rate regulation. *See, e.g., Cities of Carlisle and Neola, Iowa v. FERC,* 704 F.2d 1259, 1263 (D.C. Cir. 1983); *Aberdeen & Rockfish R.R. v. United States,* 664 F.2d 41, 42-43 (5th Cir. 1981).

[28] Indeed, given the existence of the settlement, ASRC has been given a premium in exercising its remedy; even after the Commission's approval of the settlement, ASRC remains free to litigate for even lower rates, without fear of the carriers winning the extra-contractual right to file tariffs in excess of the TSM ceilings.

C. The Commission's Approval Of The *TAPS* Settlement As To All Consenting Parties And The Termination Of The Proceeding Is Consistent With The FERC's Own Regulations As Well As Substantial Legal Precedent.

Petitioner challenges the court of appeals' holding that the Commission is vested with wide discretion under its settlement rules and, under the circumstances in this case, could properly approve the *TAPS* settlement, terminate its investigation and remit ASRC to its available remedies under the Act. Alleging, in essence, that the Commission's regulations do not mean what they say, Petitioner goes on to suggest that the court's holding is inconsistent with the rulings of this Court and other courts of appeals and has put the rules governing settlement into a state of confusion. However, the procedure contemplated by those rules—severing a party from a settlement, approving the settlement as uncontested, and preserving the severed party's right to seek further remedies in a separate proceeding—is, and has been, clear from the outset.[29] Moreover, that procedure comports with the same court's previous holding in *United Municipal Distributors Group v. FERC*, 732 F.2d 202

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[29] Petitioner's contention that Rule 602(h) requires the Commission to resolve the merits of a contested settlement is significantly undercut by subpart (i) of Rule 602(h), which states only that "the Commission *may* decide the merits of the contested settlement issues" (emphasis added). Equally unsupported is Petitioner's conclusion that Rule 602(h)(ii)(B) provides nothing more than an alternative means for eliciting substantial evidence upon which to base approval of a contested settlement on the merits. That rule—which empowers the Commission to "[t]ake other action which the Commission determines to be appropriate"—confers far too much discretion to admit the restrictive gloss contrived by Petitioner. Moreover, Rule 602(h)(ii)(A), which permits the Commission to "establish procedures for the purpose of receiving additional evidence" upon which to approve a settlement on the merits, would, under Petitioner's interpretation, render alternative (B) wholly redundant. There is, after all, no other way to elicit evidence than by "receiving" it

(D.C. Cir. 1984), *and in no way creates a conflict among the circuits or with any decision of this Court.*[30]

The rules of settlement in FERC proceedings are, and have been, abundantly clear. Indeed, the procedure employed by the FERC in approving the *TAPS* settlement—while assuring ASRC an opportunity to initiate a later challenge against the settlement rates—is precisely what the court of appeals approved in *United*, *supra*. There, the same court upheld a FERC decision that had severed a protestant from a proposed settlement and approved the settlement as uncontested, while affording the protestant (a current ratepayer) a further procedural remedy to challenge the rates it was being charged. Unlike the ratepayer in *United*, ASRC must save its "future challenge[] for a riper moment." 832 F.2d at 167. However, unlike the situation in *United*, ASRC is *not* a current or past ratepayer, and thus the right to initiate a proceeding under Section 13 or Section 15 of the Act constitute's its "legally prescribed remed[y]." *United supra*, 732 F.2d at 210, n.12; *see also Southern*, *supra*, 442 U.S. at 454; *U.S. v. SCRAP*, *supra*, 412 U.S. at 692 n.16.

Requiring the Commission to resolve all asserted grievances on the merits before approving a settlement would significantly erode the Commission's settlement process as a means of securing fair and enduring solutions to complex regulatory litigation.[31] As the court noted in

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[30] Petitioner also contends that review is warranted because it involves administrative law principles enunciated by the United States Court of Appeals for the District of Columbia Circuit, a court asserted to be uniquely authoritative with respect to such principles. Aside from the impact that granting review on such grounds would have on this Court's docket, Petitioner's suggestion has been rejected by the D.C. Circuit itself (*Public Serv. Comm'n of N.Y. v. F.P.C.*, 472 F.2d 1270, 1271-73 (D.C. Cir. 1972)), and constitutes an inappropriate basis for granting certiorari.

[31] Petitioner makes the specious claim that "increasing pressure" on courts and agencies to settle litigation provides a reason for this Court's review. However, if anything in the law is well-settled,

Pennsylvania Gas & Water Co. v. FPC, 463 F.2d 1242, 1245 (D.C. Cir. 1972):

> "If it were not within the power of the Commission to do so [terminate investigations on the basis of settlement], any customer of a natural gas company could tie up its supplier and the Commission for an indefinite period in the trial of a limitless variety of issues, where there is no genuine issue of material fact, despite the ease with which their inherent worth or worthlessness might otherwise be quickly determined."

See also Northwest Pipeline Corp., 31 FERC (CCH) ¶ 61,263 at 61,516 (1985). Armed with veto power over settlements, participants in complex, multi-party regulatory litigation would be further emboldened to play "dog-in-the-manger" and frustrate the attempts of settling parties in hopes of extorting a better deal for itself, just as ASRC has attempted to do in *TAPS*.[32]

Clearly, such a requirement cannot reasonably be inferred from the judicial decisions dealing with the treatment of settlements by the FERC. Petitioner refers, Pet. at 28-29, to a number of cases, including this Court's decision in *Mobil Oil Corp. v. FPC*, 417 U.S. 283 (1974), *aff'g Placid Oil Co. v. FPC*, 483 F.2d 880 (5th Cir.

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it is that settlement of litigation, including regulatory cases, are favored by public policy. (*See, e.g., Williams v. First Nat'l Bank*, 216 U.S. 582 (1910); *Bergh v. Department of Transp.*, 794 F.2d 1575 (Fed. Cir.), *cert. denied*, 107 S.Ct. 437 (1986); *Continental Oil Co. v. FPC*, 373 F.2d 96 (10th Cir. 1967)).

[32] Petitioner's assertion that it "would have joined the [*TAPS*] settlement in this case if certain modifications were made," Br. at 18, underscores this point. As a matter of fact, ASRC never volunteered to *join* the settlement. Rather, in its Comments filed in opposition to the Two-Carrier Amendment, ASRC offered to withdraw its opposition if the settlement were modified to conform more closely with ASRC's litigation position in the *TAPS* proceeding. (C.A. App. at 1422-1425.) In making that offer, however, ASRC made it abundantly clear that it in no way would be bound by the settlement, as modified, and would remain free to challenge TAPS rates filed pursuant to settlement, just as it is now. (*Id.*)

1973), which Petitioner asserts *requires* the Commission to address a disputed settlement on the merits. However, as the court of appeals concluded in *United*, *supra*, 732 F.2d at 209, "The *Mobil* Court's recognition that the Commission '*may*' approve a contested settlement on the merits by no stretch of the imagination translates into a requirement that the agency *must* do so." (Emphasis by court). The cases upon which Petitioner relies involve Commission approval of *contested* settlements, with the consequent imposition of the settlement terms on all of the parties to the proceeding. The fact that the Commission did not impose the *TAPS* settlement on ASRC rendered it a stranger to that settlement and enabled the Commission to approve the settlement as to the consenting parties as *uncontested*. Although the court of appeals noted in *Mobil* that " 'even if there is a lack of unanimity, [a settlement] *may* be adopted as a resolution on the merits . . .' " 417 U.S. at 314 (original emphasis deleted), the court clearly did *not* suggest that the Commission was precluded from foregoing a decision on the merits, and approving a non-unanimous settlement as uncontested as to the consenting parties. None of the court of appeals' cases cited by ASRC suggests otherwise.

II. THE COURT OF APPEALS CORRECTLY UPHELD THE FERC'S DECISION ON THE SAME GROUNDS RELIED UPON BY THE COMMISSION.

In contending that the court of appeals violated this Court's injunction in *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947), against upholding agency decisions on grounds other than those advanced by the agency itself, Petitioner emphasizes the court's apparent disagreement with the FERC's finding that ASRC was not "aggrieved" by the Commission's approval of the settlement and the termination of its investigation in to TAPS rates. Petitioner also maintains that the Commission approved the settlement as *uncontested* under Rule 602(g) (by virtue of ASRC's lack of aggrievement), whereas the court upheld the FERC's action "as a proper exercise of administrative 'discretion'

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to take appropriate action to approve a *contested* settlement under Rule 602(h)." Pet. at 16 (citation omitted, emphasis added). Petitioner is wide of the mark for a number of reasons.

In the first place, a comparison of the court of appeals decision and the FERC's Orders fails to reflect the deviation identified by Petitioner; each opinion makes it clear that the procedure used by FERC in severing ASRC and approving the settlement as uncontested as to the settling parties depends upon *both* Rules 602(h) and 602(g).[33] Thus, in its October 23, December 19 and June 27 Orders, the FERC expressly relied on the court of appeals' previous decision in *United*, *supra*, 732 F.2d 202 (interpreting Rule 602(h)), in determining that ASRC's interest in opposing the settlement was not sufficient to block approval of the settlement as uncontested (under Rule 602(g)) with respect to the consenting parties. *TAPS*, 35 FERC (CCH) at 61,979-61,980.[34] The Court also relied upon its *United* decision in holding that Rule 602(h) of the FERC's settlement rules permitted the Commission to "sever a contesting party" to the settlement, "treat the matter as *uncontested*," and approve the settlement under the "fair and reasonable" standard (applicable to uncontested settlements) found in Rule 602(g). 832 F.2d at 164, 167 & nn.19, 21.

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[33] Indeed, Petitioner's suggestion that the Commission did not invoke its discretion under Rule 602(h) in treating the settlement as uncontested is flatly inconsistent with the position taken by ASRC in its brief to the court of appeals, where it asserted that the Commission *erred in relying on that very rule*. According to ASRC, "FERC was forced to construe FERC Rule 602(h), dealing with *contested* offers of settlement (in approving the settlement as uncontested) . . . . FERC relied on the second part of subsection (1) (of Rule 602(h)) to justify its actions." (ASRC C.A. Br. at 65 (emphasis in original). Accordingly, Petitioner's *Chenery* argument is entitled to no credence.

[34] In its December 19 Order, the Commission expressly invoked Rule 602(h)(1)(iii) in support of its use of the severence procedure. 33 FERC (CCH) ¶ 61,392 n.4.

In the second place, ASRC's virtual exclusive reliance on the court's "disagreement" with the Commission on the issue of aggrievement is devoid of substance. In its June 23 Order, the Commission approved the Two-Carrier Amendment to the *TAPS* settlement on the basis of a previous holding in another proceeding that, " 'If a party's interests are not *immediately and irreparably affected* by approval of a settlement . . . that party's opposition to a settlement does not create a genuine, material issue.' " 35 FERC (CCH) at 61,980-61,981 (citation omitted) (emphasis by Commission). Based on the same standard, the Commission ruled that it was free to terminate its investigation into TAPS rates under Section 15(7) of the Act, since ASRC remained free to protect its interests by filing a protest against the TSM rates under Section 15(7) of the Act or a formal complaint under Section 13.

The court of appeals did not question the Commission's analysis in any meaningful way. It only questioned the Commission's subsidiary suggestion that ASRC was not aggrieved in the sense necessary to support judicial standing. 832 F.2d at 162-163 & n.10. The court agreed wholeheartedly with the Commission that ASRC's "less direct" interest was insufficient to preclude the action taken by the Commission in approving the settlement as to the consenting parties and terminating its investigation. *Id.* at 167, n.21. Indeed, the court stated explicitly that the Commission had adequately "serve[d] [ASRC's] interests by not forcing the settlement upon [ASRC] and by preserving possible future challenges for a riper moment." *Id.* at 167. Because the court clearly agreed with the substance of the Commission's finding that ASRC's asserted interest had been properly accommodated, there is little to be gained by dissecting the court's commentary on the FERC's subsidiary findings as to standing.[35] "*Chenery* does not require that [the Court]

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[35] *Compare Penn-Central Merger and Norfolk & Western Inclusion Cases*, 389 U.S. 486, 526-527 n.14 (1968) (Court refused to apply *Chenery* principle, where reviewing court had disputed "sub-

convert judicial review of agency action into a ping-pong game." *NLRB v. Wyman-Gordon Co.*, 397 U.S. 759, 766-767 n.6 (1969).

Finally, the fact that the Commission had adequately protected ASRC's interests in approving the settlement did not constitute the sole basis for the court's decision to uphold the Commission. Indeed, the court expressly endorsed a number of other grounds advanced by the Commission in approving the settlement (all of which Petitioner fails to address), saying:

> "Quite apart from bringing a merciful conclusion to the protracted litigation, the settlement's salutary features include the fact that rates have come down substantially—and continue to do so—under the TSM; that the State of Alaska has received substantial refunds redounding to the benefit of its citizens; and that, in the Commission's view, competition will be increased in the settlement's wake. Finally, it is of no little moment that the entities charged with protecting the public interest, including the State of Alaska and the Department of Justice, have heartily approved of the settlement."

832 F.2d at 167. The court also affirmed the Commission's findings regarding the evidentiary obstacle to granting ASRC the relief it seeks—*i.e.*, a determination of just and reasonable rates for the 1990s and beyond. Like the Commission, the court believed that "[t]he reasonableness of rates to be charged into the 1990's (and beyond) can hardly be evaluated exclusively on the basis of a factual record that draws to a close in 1982." 832 F.2d at 166; *compare* 35 FERC (CCH) at 61,981. Under these circumstances, the court correctly found that the Commission's decision not to undertake such an effort at this time was well-founded.

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sidary" findings but agreed in substance with ICC decision); *see also Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974), *reh'g denied*, 420 U.S. 956 (1975).

III. THE DECISION BELOW SUBSTANTIALLY ADVANCES THE PUBLIC INTEREST WITHOUT DEPRIVING PETITIONER OF ANY LEGAL PROTECTION TO WHICH ITI S ENTITLED.

Petitioner does not, and cannot, challenge the manifest public benefits achieved under the *TAPS* settlement.- Both DOJ and the State, which litigated this matter for a decade as adversaries of the TAPS owners, have strongly endorsed this settlement for its public interest benefits. Specifically, the settlement has: (1) spelled the final chapter of what has now been more than eleven years of litigation; (2) resulted in payments of more than $500 million in additional royalties and taxes to the State of Alaska and refunds to shippers unaffiliated with the TAPS owners; and (3) promoted the interest of the State and its citizenry by substantially reducing TAPS rates from an average of more than $6.00 per barrel to an average of just over $3.00 per barrel in less than three years, thus (in the Commission's view) "encourag[ing] competitive exploration for Alaskan oil and enhanc[ing] Alaska's future oil-related revenues." *TAPS*, 33 FERC (CCH) at 61,139. Finally, the settlement provides a measure of certainty for those who wish to develop the State's petroleum interests, by imposing a ceiling on future TAPS rates, and removing the questions involving the historic TAPS rates.

Further judicial review would serve only to cast doubt over the public benefits achieved by the settling parties by virtue of their bargain. Pending such review, the level of TAPS rates would again be subject to speculation, thereby impairing the State's ability to maximize the development of its petroleum resources. Such speculation could persist indefinitely, subject to resolution only retrospectively, after any particular rate became effective. The carriers would also be plagued by uncertainty concerning the extent of their refund obligations accrued

over eleven years of TAPS operations, as well as their rights with respect to future rates.

There is nothing to be gained, even by ASRC, from review of the court of appeals' decision. If this Court were to remand this proceeding to afford ASRC a further hearing with respect to the "rates in issue," that proceeding would be limited to the rates in effect prior to the implementation of the settlement agreement by the parties thereto—rates ASRC has never paid. The TSM rates filed in 1985, 1986, 1987, and 1988 have never been involved in the prior proceedings and thus would not be involved in any remand. Indeed, ASRC has never protested those rates, let alone filed a complaint directed to them, and no party with a direct interest in those rates has expressed any dissatisfaction with them. ASRC is fully protected by its right to file a complaint or protest against any future rates which impact its interests and those interests would not be advanced by reopening the *TAPS* proceedings which are the subject of its Petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

RULE 28.1 DISCLOSURE

Pursuant to Supreme Court Rule 28.1, respondents hereby submit the following list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each respondent.

Amerada Hess Pipeline Corporation

Amerada Hess Corporation
Alyeska Pipeline Service Company

ARCO Pipe Line Company

Atlantic Richfield Company
Alyeska Pipeline Service Company
ARCO Chemical Company
85819 Canada Ltd.

Exxon Pipeline Company

Exxon Corporation
Exxon Capital Holdings Corporation
Exxon Capital Corporation
Alyeska Pipeline Service Company

Mobil Alaska Pipeline Company

Mobil Corporation
Mobil Oil Corporation
Alyeska Pipeline Service Company

Phillips Alaska Pipeline Corporation

Phillips Petroleum Company
Phillips Investment Company
Alyeska Pipeline Service Company

Sohio Alaska Pipe Line Company

The British Petroleum Company p.l.c.
BP International Limited
BP America Inc.
The Standard Oil Company
Alyeska Pipeline Service Company
Sohio Pipe Line Company

Unocal Pipeline Company

Unocal Corporation
Union Oil Company of California
Alyeska Pipeline Service Company

STATUTORY AND REGULATORY PROVISIONS INVOLVED

49 U.S.C. § 15(1)

§ 15 Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so

prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

49 U.S.C. § 15(7)

(7) Commission to determine lawfulness of new rates; suspension; refunds; nonapplicability to common carriers by railroads subject to chapter.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate

or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

18 C.F.R. § 385.602 (1987)

§ 385.602 Submission of settlement offers (Rule 602).

(a) *Applicability.* This section applies to written offers of settlement filed in any proceeding pending before the Commission or set for hearing under Subpart E. For purposes of this section, the term "offer of settlement" includes any written proposal to modify an offer of settlement.

(b) *Submission of Offer.* (1) Any participant in a proceeding may submit an offer of settlement at any time.

(2) An offer of settlement must be filed with the Secretary. The Secretary will transmit the offer to:

(i) The presiding officer, if the offer is filed after a hearing has been ordered under Subpart E of this part and before the presiding officer certifies the record to the Commission; or

(ii) The Commission.

(c) *Contents of offer.* (i) An offer of settlement must include:

(i) The settlement offer;

(ii) A separate explanatory statement;

(iii) Copies of, or references to, any document, testimony, or exhibit, including record citations if there is a record, and any other matters that the offerer considers relevant to the offer of settlement; and

(iv) A separate proposed Commission order approving the settlement, including the following statement: "The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding."

(2) If an offer of settlement pertains to a tariff or rate filing, the offer must include any proposed change in a form suitable for inclusion in the filed rate schedules or tariffs, and a number of copies sufficient to satisfy the filing requirements applicable to tariff or rate filings of the type at issue in the proceeding.

(d) *Service.* (1) A participant offering settlement under this section must serve a copy of the offer of Settlement:

(i) On every participant in accordance with Rule 2010;

(ii) On any person required by the Commission's rules to be served with the pleading or tariff or rate schedule filing, with respect to which the proceeding was initiated.

(2) The participant serving the offer of settlement must notify any person or participant served under paragraph (d)(1) of this section of the date on which comments on the settlement are due under paragraph (f) of this section.

(e) *Use of non-approved offers of settlement as evidence.* (1) An offer of settlement that is not approved

by the Commission, and any comment on that offer, is not admissible in evidence against any participant who objects to its admission.

(2) Any discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence.

(f) *Comments.* (1) A comment on an offer of settlement must be filed with the Secretary who will transmit the comment to the Commission, if the offer of settlement was transmitted to the Commission, or to the presiding officer in any other case.

(2) A comment on an offer of settlement may be filed not later than 20 days after the filing of the offer of settlement and reply comments may be filed not later than 30 days after the filing of the offer, unless otherwise provided by the Commission or the presiding officer.

(3) Any failure to file a comment constitutes a waiver of all objections to the offer of settlement.

(g) *Uncontested offers of settlement.* (1) If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the Commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) *Contested offers of settlement.* (1)(i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Com-

mission may decide the merits of the contested settlement issues, if the record contains susbtantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contested issues can not be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

(iii) If contested issues are severable, the uncontested portions may be severed and decided in accordance with paragraph (g) of this section.

(2) (i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested, whole or in part, by any participant, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only if paragraph (h) (2) (ii) or (iii) of this section applies.

(ii) Any offer of settlement or part of any offer may be certified to the Commission if the presiding officer determines that there is no genuine issue of material fact. Any certification by the presiding officer must contain the determination that there is no genuine issue of material fact and any hearing record or pleadings which relate to the offer or part of the offer being certified.

(iii) Any offer of settlement or part of any offer may be certified to the Commission, if:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710;

(B) The presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues; and

(C) The parties have an opportunity to avail themselves of their rights with respect to the presentation of evidence and cross-examination of opposing witnesses.

(iv) If any contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the Commission for decision, as provided in paragraph (g) of this section.

(i) *Reservation of rights.* Any procedural right that a participant has in the absence of an offer of settlement is not affected by Commission disapproval, or approval subject to condition, of the uncontested portion of the offer of settlement.

49 C.F.R. § 1100.42 (1976)

§ 1100.42 Petitions for suspension of tariffs or schedules (Rule 42).

(a) *Content.* The protested tariff or schedule sought to be suspended should be identified by making reference to the name of the publishing carrier, freight forwarder, or agent, to the Interstate Commerce Commission number, and to the specific items or particular provisions protested. Reference should also be made to the tariff or schedule, and the specific provisions thereof, proposed to be superseded. The protest should state the grounds in support thereof, indicate in what respect the protested tariff or schedule is considered to be unlawful, and state what protestant offers by way of substitution. Such protests will be considered as addressed to the discretion of the Commission and no protest shall include a prayer that it also be considered a formal complaint. Should a

protestant desire to proceed further against a tariff or schedule which is not superseded, or which has been suspended and the suspension vacated, a separate later formal complaint or petition should be filed.

(b) *When filed.* Protests against, and requests for suspension of, tariffs or schedules filed under the act will not be considered unless made in writing and filed with the Commission at Washington, D.C. Such protests and requests for suspension shall reach the Commission at least 12 days (except as proved in paragraph (c) of this section) before the effective dates of the tariffs, schedules, or parts thereof to which they refer, unless the protested publications were filed on less than 30-days notice under the authority of this Commission, in which event the protests should be filed no less than 5 days before such effective dates. In an emergency, telegraphic protests will be acceptable if received within the time limits herein specified, provided they also fully comply with paragraph (a) of this section and copies thereof are immediately telegraphed by protestants to the respondent carriers or their publishing agents. Six copies of such telegrams should immediately be mailed by the protestants to the Commission at Washington.

* * * *

(d) *Copies; service.* Seven copies of each protest or reply filed under this section must be filed with the Commission and one copy of the protest simultaneously be served upon the publishing carrier, freight forwarder, or agent, and upon other persons known by protestant to be interested.

(e) *Reply to protest.* A reply to a protest filed under this section should be filed and served promptly.

* * * *